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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-2710

ARMANDO DIAZ, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Armando Diaz, appeals through counsel that part of a March 23, 2015, Board of Veterans' Appeals (Board) decision that denied him benefits based on service connection for a cervical spine disorder.<sup>1</sup> Record (R.) at 2-12. The appellant argues that the Board erred in relying on inadequate VA medical examinations. Appellant's Brief at 6-18. For the foregoing reasons, that part of the Board's March 23, 2015, decision on appeal is affirmed.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant

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<sup>1</sup> The Board also remanded the appellant's claims for (1) benefits based on service connection for a psychiatric disorder; (2) benefits based on service connection a bacterial infection in the stomach; and (3) a disability rating in excess of 10% for a duodenal, or abdominal ulcer. R. at 12-17. These matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Army from February 1964 to July 1966, primarily as a light weapons infantryman stationed at Fort Hood, Texas. R. at 988-91 (DD Form 214). In June 1965 the appellant's hand was run over by a truck, and 30 minutes later he arrived at an Army hospital where he was diagnosed with a thumb fracture. R. at 2979. In February 1966 the appellant suffered lacerations to his scalp after a car accident and received sutures to his "head or neck" and x-rays of his skull. R. at 1015, 1047, 1975, 2000-07. At his June 1966 separation examination, the appellant reported that his "spine, other musculoskeletal" system was "normal," and that he did not suffer from back pain. R. at 994-96.

In February 1968 and August 1975 the appellant sought treatment for lower back pain. R. at 2654-65, 2866, 2899. In October 1994 the appellant sought private treatment for back and neck pain, stating that he injured his neck the prior month when he "turned around too quickly" and that his pain had persisted. R. at 3283. In October 1995 the appellant sought private treatment for "back and neck discomfort" which he attributed to a car accident that took place the previous April. R. at 3285. An October 2000 private treatment note indicates the appellant continued to suffer from neck pain. R. at 1998.

In October 2003 the appellant filed a claim for benefits based on service connection for a neck disability, alleging that he injured his neck in the February 1966 car accident. R. at 2946, 3172.

In June 2004 the appellant underwent a VA examination, where an x-ray of his cervical spine revealed degenerative changes. R. at 2829. The examiner diagnosed the appellant with a mild cervical strain, which he opined was likely "not related to military service." R. at 2830. In a March 2005 rating decision the regional office (RO) denied the appellant's neck condition claim. R. at 2746-58.

In April 2006 the appellant submitted a statement that he had injured his neck "on or about July 1965" when a truck ran over his hand, and that he was transported to the hospital in a neck collar. R. at 2600-03. The appellant also stated that he had re-injured or aggravated his neck injury

in the years after service. R. at 2601. The appellant also submitted a statement from Dr. Richard Feher, a private chiropractor. R. at 2604-08. Dr. Feher found that the June 1965 car accident was "the cause of [the appellant's] current condition of [severe] subluxation with subsequent spinal stenosis of the cervical spine." R. at 2608. Dr. Feher also found that the degenerative changes in the appellant's neck were "at least over 20 years [old] and are caused by severe neck trauma." R. at 2607.

In August 2007 the appellant testified before the Board that he was hospitalized for the 9 months leading up to his discharge from service and that he had not mentioned his conditions at separation for fear he would be unable to go home. R. at 2449.

In November 2008 the appellant underwent a VA examination, contending that his neck disability was caused by the in service car accident "where his hand was run over." R. at 1956. The examiner noted the appellant's complaints of daily "pain, stiffness, weakness, fatigability, lack of endurance, and loss of motion" in his cervical spine, symptoms he attributed to a "head injury received in 1966." R. at 1957. The examiner diagnosed the appellant with degenerative disc disease of the cervical spine, but opined that the condition

is not a result of or caused by the condition he suffered while on active duty in the [U.S.] Army as documented in his service medical record in 1966. The veteran has 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is no indication that the veteran suffered a significant cervical spine condition in 1966 while on active duty. More likely etiologies for these claimed conditions are the more common etiologies for osteoarthritis including, but not limited to: age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life[ ]style choices and post-service occupation.

R. at 1960.

That same month the appellant submitted another statement, clarifying that his neck was stabilized when he was thrown from a truck in June 1965, and that his neck continued to be problematic after his accident in February 1966. R. at 1971-72. In a December 2008 rating decision the RO denied the appellant's claim. R. at 1932-36. The appellant appealed. R. at 1921. In September 2010 the appellant testified before a decision review officer (DRO) that his neck was injured in both the June 1965 and February 1966 accidents. R. at 1892-93.

In March 2015 the Board denied the appellant's claim for service connection for a neck condition. R. at 2-13. The Board acknowledged that the appellant suffered from a current disability, but noted that "no cervical spine condition was present at discharge" and the appellant did not report any neck pain when he sought treatment for his back in the decade after separation. R. at 10. The Board found the appellant's statements regarding the cause of his neck condition and the "recent contentions that he has experienced neck problems since service" not credible. R. at 11. The Board noted in particular the fact that the appellant first complained of neck pain in October 1994, when he attributed the condition to "turning too quickly" the prior month. R. at 10-11. The Board added that the appellant did not contend that he has suffered from neck pain since service until after filing his claim. R. at 10-11. The Board found the opinion of the November 2008 examiner more probative than Dr. Feher's April 2006 opinion, stating that Dr. Feher's opinion was "based upon an inaccurate portrayal of the accident during service – the records do not reflect such a severe injury to the neck, or any injury or complaints regarding the neck." R. at 11. This appeal follows.

The Court discerns no clear error in the Board's finding that the appellant's current neck condition is unrelated to service. *See Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (Court reviews Board's rating decisions for clear error); *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The Board properly relied on the findings of the June 2004 and November 2008 examiners that there is no evidence to connect the appellant's current neck disability to either an incident, treatment for or complaints of neck pain in service, and properly relied on the appellant's failure to report any neck problems at separation. R. at 10-11. The Board also properly discounted the April 2006 private chiropractor's opinion, finding that it was based on a belief that the appellant suffered a neck injury in service, which is not supported by the record. R. at 10-11. The appellant has failed to satisfy his burden of persuasion that his current neck condition began anytime before 1994, or is otherwise the result of an in-service incident. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The Court disagrees with the appellant that both examiners relied too heavily on the absence of records of treatment for the neck before 1994, and failed to properly consider his lay testimony as evidence of his neck pain beginning in service. *See Appellant's Brief* at 6-18. The Board properly

found that the appellant's reports of having suffered from neck pain since service as a result of his two car accidents were not credible. R. at 11. The Board noted that when the appellant first sought treatment for neck pain in October 1994, he attributed the pain to having turned around too quickly the prior month. R. at 8, 3283. The Board also noted that when the appellant sought treatment in October 1995, he attributed his neck pain to a car accident in April 1995. R. at 8, 3285. For these reasons, the Court discerns no clear error in the Board's finding that the appellant's lay testimony is not credible and the decision is otherwise supported by an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated by statute that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court).

For the foregoing reasons, that part of the Board's March 23, 2015, decision on appeal is AFFIRMED.

DATED: November 30, 2016

Copies to:

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